

DRUG AND ALCOHOL TESTING IN THE WORKPLACE

presented by

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Employee drug and alcohol testing is subject to regulation under both state and federal law, including the Fourth Amendment to the United States Constitution, and with limited exceptions, constitutes a mandatory subject of bargaining.

A. Drug and Alcohol Testing and the Constitution

1. Unreasonable Searches Are Prohibited Under Montana and Federal Law.

Both Article II, Section 11 of the Montana Constitution and the Fourth Amendment to the U.S. Constitution prohibit governments from conducting unreasonable searches. *See State v. Malkuch*, 336 Mont. 219, 222 (2007); *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). While these provisions apply to drug and alcohol testing in the workplace, they do not apply to private employers.

2. Individualized Suspicion of Wrongdoing Constitutes Reasonableness.

A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). While such suspicion is not an “irreducible” component of reasonableness, *Martinez-Fuerte*, 428 U.S. 543, 561 (1976), the U.S. Supreme Court has recognized circumstances in which the usual rule does not apply.

3. Federal Exceptions Authorizing Suspicionless Searches.

The Supreme Court has upheld certain regimes of suspicionless searches where the program was designed to serve “special needs, beyond the normal need for law enforcement.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes); *Nat’l Treas. Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations). The Court has also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. *See, e.g., New York v. Burger*, 482 U.S. 691, 702–04 (1987) (warrantless administrative inspection of premises of “closely regulated” business); *Michigan v. Tyler*, 436 U.S. 499, 507–09, 511–12 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534–39 (1967) (administrative inspection to ensure compliance with city housing code).

B. Drug and Alcohol Testing is a Mandatory Subject of Bargaining

1. Drug Testing is a Mandatory Subject of Bargaining.

Johnson-Bateman Co. and Machinists, AFL-CIO, Dist. Lodge 120, 295 NLRB 180 (1989). *See also* General Counsel Memorandum 87-5 (September 8, 1987), Guideline Memorandum Concerning Drug or Alcohol Testing of Employees (recommending that the NLRB take the position that drug and alcohol testing be a mandatory subject of bargaining). *Cf. Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299 (1989) (Railway Labor Act).

2. Testing Provisions in CBAs Must be Consistent with State and Federal Law.

Where drug and alcohol testing is neither required nor prohibited by state or federal law, testing may be negotiated by the parties to a collective bargaining agreement. Likewise, the union and the employer may bargain over testing procedures that are not inconsistent with state or federal law.

3. Testing Provisions are Permissive in CBAs Because Unions May Explicitly or Implicitly Consent to Drug and Alcohol Testing on Behalf of Employees.

Bolden v. Southeastern Pennsylvania Transportation Authority and Transport Workers Union of Philadelphia, Local 234, 935 F.2d 807 (3rd Cir. 1991); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 119 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989) (reasoning that an employee's reasonable expectation of privacy in testing depends on the Union's concessions during collective bargaining); *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, 491 U.S. 299, 311–12 (1989) (reasoning that implied authorization of testing based on practice, usage, and custom must be treated the same as explicit consent).

C. Workplace Drug and Alcohol Testing Under Federal Law¹

1. Safety-Sensitive Transportation Employees Must Be Tested.

The Omnibus Transportation Employee Testing Act of 1991 49 U.S.C. § 5331 is a federal statute requiring drug and alcohol testing for safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. The Act covers a majority of the transportation workers. In February 1994, the DOT expanded existing drug testing rules to include mandatory drug testing of aviation, interstate motor carrier, railroad, pipeline, commercial marine employees, and all employees who are required to have a commercial driver's license.

2. The U.S. Department of Transportation (DOT) Regulates Testing.

The DOT publishes rules detailing the persons who must conduct drug and alcohol tests, and the method of conducting those tests. These regulations cover all transportation employers, safety-sensitive transportation employees, and service

¹ Section C contains direct quotes and information from the *Employer Guide to Drug Testing*, Montana Department of Labor and Industry website.

agents. The Office of Drug & Alcohol Policy & Compliance (ODAPC) publishes, implements, and provides authoritative interpretations of the testing rules in Title 49 Code of Federal Regulations (C.F.R.) Part 40. The Department of Transportation oversees the implementation and enforcement of this act for the public and private sector. 49 C.F.R. §§ 391.81, 382.101, 392.1, 40.01. *See* Appendix A for the classes of employees covered under 49 C.F.R. Part 40.

3. Procedural Regulations Apply to Federally Mandated Drug Tests.

The procedural requirements are intended to protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within certain guidelines, provide confidentiality for test results and medical histories, and ensure nondiscriminatory testing methods. The procedural regulations are enforced by administrative remedies in the form of civil and criminal penalties. 49 U.S.C. § 521; 49 C.F.R. § 382.507. There is no private cause of action available to aggrieved employees for a violation of the procedural protections. *Williams v. UPS*, 527 F.3d 1135 (10th Cir. 2008).

6. Title 49 Requires Laboratory Testing for Five Classes of Drugs:

- Marijuana
- Cocaine
- Opiates – opium and codeine derivatives
- Amphetamines and methamphetamines
- Phencyclidine – PCP

49 C.F.R. Part 40 Subpart F. The DOT does not prohibit motor carrier employers from instituting a “company authority” testing program that is in addition to, and distinct from, the required DOT testing program. Under such non-DOT programs, employers could test for other drugs. DOT also does not prohibit employers from using tests of non-urine specimens under a non-DOT program. DOT regulations at § 382.601 provide that employer materials supplied to drivers may include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer’s authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on the employer’s independent authority.

7. Types of DOT Drug and Alcohol Tests:

a. Pre-employment – An employer must receive a negative drug test result before permitting a CDL driver to operate a CMV. (§ 382.301).

b. Post-accident – Drug and alcohol tests may be required after crashes according to the following chart (§ 382.303):

<i>Type of Accident Involved</i>	<i>Citation Issued</i>	<i>Test Must Be Performed</i>
Human Fatality	Yes	Yes
Human Fatality	No	Yes
Bodily Injury with Immediate Medical Treatment Away from the Scene	Yes	Yes
Bodily Injury with Immediate Medical Treatment Away from the Scene	No	No
Disabling Damage to Any Motor Vehicle Requiring Tow Away	Yes	Yes
Disabling Damage to Any Motor Vehicle Requiring Tow Away	No	No

c. Random – CDL drivers must be randomly tested throughout the year (§ 382.305); a self-employed driver, who is not leased to a motor carrier, shall implement a random testing program of two or more covered employees in the random testing selection pool as a member of a consortium (*see* § 382.305; FMCSA Q&A No. 11).

d. Reasonable suspicion – Drivers who appear to be under the influence of drugs or alcohol can be immediately tested (§ 382.307). Employers must train CDL driver supervisors to detect the symptoms of driver impairment (§ 382.603).

e. Return-to-duty – Required for drivers who tested positive, refused, or otherwise violated the prohibitions of 49 C.F.R. Part 382 Subpart B; and who have completed the return-to-duty process with a DOT-qualified substance abuse professional. This test is directly observed, and a negative result is required before resuming driving duties (§ 382.309 and § 40.305).

f. Follow-up – Required for drivers who tested positive, refused, or otherwise violated the prohibitions of 49 C.F.R. Part 382 Subpart B; and who have completed the return-to-duty process with a DOT-qualified substance abuse professional, and have tested negative for a return-to-duty test. This testing is prescribed by the substance abuse professional for a minimum of 6 directly observed tests in 12 months but can be extended an additional four years (§ 382.311 and § 40.307).

8. 49 C.F.R. § 40 Does Not Address Disciplinary Actions After a Positive Test. However, it instructs employers to (1) immediately remove the employee from performing DOT safety-sensitive jobs and (2) provide the employee with a list of qualified Substance Abuse Professionals (SAPs). An employer must ensure that the employee (1) received an SAP evaluation and (2) successfully complied with the SAP's evaluation recommendations before allowing an employee to return to a safety-sensitive position following a positive test.

D. Workplace Drug and Alcohol Testing Under Montana Law²

1. Montana Law Does Not Mandate Drug and Alcohol Testing.

The Montana Workforce Drug and Alcohol Testing Act (the “Act”), Mont. Code Ann. §§ 39–2–205 through 39–2–211, a copy of which is provided as Appendix B, does not mandate the drug or alcohol testing of any employee in Montana. Nor does it contain provisions for its enforcement by any state or local government agency or grant any agency rule making, interpretive, or other regulatory authority. Remedies for violations of the Act are available only by way of a private, civil cause of action, brought in an appropriate court.

2. All Employers Opting to Test Employees Must Adhere to Title 49.

While the Act does not mandate drug and alcohol testing, it does require all employers using drug and alcohol testing to adopt procedures developed by the DOT (49 C.F.R. § 40). Under the Act, alcohol and controlled substance “testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer. The written policies and procedures must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures must conform to 49 C.F.R., part 40.” Mont. Code Ann. § 39–2–207(1).

3. Testing Applies to Employees and Prospective Employees:

- (a) engaged in the performance, supervision, or management of work in a:
 - (i) hazardous work environment;
 - (ii) security position; or
 - (iii) position:
 - (A) affecting public safety or public health;
 - (B) in which driving a motor vehicle is necessary for any part of the individual’s work duties; or
 - (C) involving a fiduciary responsibility for an employer.

4. Employee, Defined.

The term “employee” does not include an independent contractor or an elected official who serves on the governing body of a local government.

5. Hazardous Work Environment, Defined.

“A “hazardous work environment” includes, but is not limited to, positions:

- (a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;
- (b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or
- (c) that involve handling or proximity to flammable materials, explosives, toxic

² Section D contains direct quotes and information from the *Employer Guide to Drug Testing*, Montana Department of Labor and Industry website.

chemicals, or similar substances.” Mont. Code Ann. § 39–2–206.

6. Employers Are Responsible for Paying Employees During Testing.

Under Montana law, “initial alcohol and controlled substance testing must be at the employer’s expense. All employees must be paid at the employee’s regular rate, including benefits, for time attributable to the testing program.” Mont. Code Ann. § 39–2–207(3).

7. Reasonable Suspicion and Random Testing.

Montana law states that employers may require a covered employee to submit to a controlled substance or alcohol test when there is “reason to suspect” an employee’s faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. “An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee’s act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of \$1,500.” Employers may also conduct random and follow-up tests. Mont. Code Ann. § 39–2–208(4), (5).

8. Record Keeping.

Employers are required to keep detailed records of their alcohol misuse and controlled substance use prevention programs. “In general, all records relating to the following categories will need to be maintained: the collection process, each employee’s test results, violations, evaluations, education and training and drug testing.” See Mont. Dep. of Labor and Industry website.

9. Confidentiality.

Controlled substance and alcohol testing results and records must be maintained under strict confidentiality and may not be disclosed to anyone except: the tested employee; the designated representative of the employer; or in connection with any legal or administrative claim arising out of the employer’s implementation of or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe the tested employee may have caused or contributed to the accident. Mont. Code Ann. § 39–2–211.

10. Employee Access to Test Reports.

An employee tested under any qualified testing program must be provided by the employer with a copy of the test report. The employee must be given a chance to rebut or explain the results of any test. According to Montana law, “no adverse action, including follow-up testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption.” Mont. Code Ann. § 39–2–210.

11. Additional Testing per Employee's Request.

"The employer is also required to obtain, at the employee's request, an additional test of the urine split sample by an independent laboratory selected by the person tested." Mont. Code Ann. § 39-2-209. The employer pays for the additional tests if the additional test results are negative. The employee pays for the additional tests if the additional test results are positive.

E. Drug and Alcohol Testing Q & A

Q. Is drug and alcohol testing a mandatory subject of bargaining?

A. Under Section 8(d) of the Act: yes, drug and alcohol testing are mandatory subjects of bargaining. General Counsel Memorandum 87-5 (September 8, 1987), Guideline Memorandum Concerning Drug or Alcohol Testing of Employees.

Notably, management rights do not allow employers to implement drug and alcohol testing unilaterally because it constitutes a substantial change in the employees' terms and conditions. Further, there is a difference between a policy against drug and alcohol usage and testing to enforce that policy. Translated, this means that testing is not simply a work rule. It is a form of policing and enforcing compliance with a rule.

Q. What specifically needs to be bargained?

A. According to General Counsel Memorandum 87-5 (September 8, 1987), Guideline Memorandum Concerning Drug or Alcohol Testing of Employees, the following needs to be bargained:

1. Program contents: Under what circumstances may an employee be tested?

- (a) Pre-employment testing
- (b) Post-accident testing
- (c) Random testing
- (d) Reasonable suspicion testing (on-duty use) based on specific, contemporaneous, articulable observations concerning the employee's appearance, behavior, speech, or body odors. *See Discipline and Discharge in Arbitration*, ch. 6.II.G.3.A.ii. (Norman Brand, Melissa Biren & Alan Symonette eds., 3d ed. 2015). The smell of marijuana constitutes reasonable suspicion. *Id.*
- (e) Return-to-duty alcohol or controlled substances testing
- (f) Follow-up alcohol or controlled substance testing

2. Test procedures: Was the testing procedure proper?

- (a) Methods for assuring test sample security
- (b) Methods for assuring test accuracy
- (c) Effects: What happens when an employee tests positive for the presence of a controlled substance?
 - (i) Effects on seniority;
 - (ii) Effects on wages;

- (iii) Effects on position;
 - (iv) Effects on hours.
- (d) Whether drug testing is necessary for job applicants
- (e) Off-duty drug use
- (f) Off-duty alcohol use
- (g) Discipline:
 - (i) Criminal conviction as a basis for discipline.
 - (ii) Discipline assessed while criminal charges are pending rehabilitation.

Q. What about Union Waiver of its Bargaining Rights?

A. An employer's unilateral implementation or revision of a drug and alcohol violates the National Labor Relations Act. *Discipline and Discharge in Arbitration* ch. 6.II.G.1. (Norman Brand, Melissa Biren & Alan Symonette eds., 3d ed. 2015) (citing *Syigma Network Corp.*, 317 NLRB 411, 149 LRRM 1247 (1995)). Union waiver of its statutory right to bargain over drug and alcohol testing may be done by contract, past practice, or inaction, and must be clear and unmistakable. *Id.*

Q. What do I need to know about the Fourth Amendment and testing?

A. "Although it has been argued that drug testing violates Fourth Amendment rights against unlawful search and seizure, Fourth Amendment safeguards have been found inapplicable in the private sector." *Id.* (citing *Bi-state Dev. Agency*, 72 LA 198 (Newmark, 1979)). However, that is not the case in the public sector. *Id.* (citing *Department of the Army*, 92 LA 995 (Concepcion, 1989)). See Appendix C for a more detailed analysis of the Fourth Amendment.

Q. How does federal law interact with labor law?

A. In transportation industries, the federal government requires employers to implement drug testing. Therefore, arbitrators apply the governmental regulations regardless of whether the employer and the Union negotiated. Federal regulations supplant the duty to bargain. Issues not mandated by the federal regulations, such as discipline and rehabilitation, are mandatory subjects of bargaining. *Discipline and Discharge in Arbitration, supra*, ch. 6.II.G.1. For example, in *Amerigas*, the employer was required to adopt the Department of Transportation ("DOT") regulations requiring random drug tests and was not permitted to adopt other policies that exceeded DOT regulations without negotiating with the Union over these additions. 102 LA 1185 (Marino, 1994).

Q. What is the difference between federal and state law?

A. Montana law does not mandate drug and alcohol testing, whereas federal law does for certain transportation industries. Instead, Montana allows testing for all employees working in hazardous work environments, such as work involving aviation, commercial motor vehicles, railroads, pipeline, commercial marine work,

mining, construction equipment, industrial machinery, explosives, toxic chemicals, and flammable materials. Montana law does not apply to independent contractors, whereas federal law does apply. Montana law permits employers to test any individual if:

The employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of \$1,500. Montana law also states that employers may require an employee subject to state statute to submit to a controlled substance, or alcohol test when there is "reason to suspect" an employee's faculties are impaired on the job due to the use of a controlled substance or alcohol consumption.

Notably, Montana law requires all employers using drug and alcohol testing to adopt procedures developed by the DOT. The DOT also publishes other industry-specific rules and regulations are produced by the Federal Aviation Administration ("FAA"), Federal Railroad Administration ("FRA"), Federal Transit Administration ("FTA"), and the Research and Special Programs Administration ("RSPA").

However, we will focus on the Federal Motor Carrier Safety Association ("FMCSA") regulations during this CLE, as they are the most broadly applicable. Please see the following list for guidance on pipeline, railroad, and transit regulations: For pipeline safety drug and alcohol testing, see Parts 199.1 through 199.245. For railroad drug and alcohol testing, see Parts 219.1 through 219.1007. For regulations on transit operation drug and alcohol use, see Parts 655.1 through 655.83.

Q. Where do I find the DOT regulations?

A. These regulations can be found in Title 49 of the Code of Federal Regulations ("C.F.R."). If you employ people performing safety-sensitive functions, we recommend you direct your attention to Title 49 of the Code of Federal Regulations, Parts 40 and 392. If you employ people holding a Commercial Driver's License ("CDL"), we recommend you direct your attention to Title 49 of the Code of Federal Regulations, Parts 382, 383, and 391.

Part 40 is quite extensive, housing employee testing, rehabilitation, and return to work policies. Part 382 is designed to prevent accidents and injuries resulting from alcohol misuse or controlled substance use by CMV drivers. This Part addresses the *Part 383 disqualifications* specific to controlled substances and alcohol use and houses testing policies. It also mandates employers to promulgate policy on the misuse of alcohol and use of controlled substances. Part 383 outlines the CDL standards, requirements, and penalties for violating the drug and alcohol rules for drivers of vehicles over 26,000 pounds Gross Vehicle Weight Rating ("GVWR"). Part 391 provides the qualifications for CMV drivers and longer combination vehicle instructors, and the general disqualifications for drivers who drive CMVs above

10,000 pounds GVWR, only when the vehicle is used in interstate commerce in a State, including the District of Columbia. This means that Part 391 applies to all CMV drivers, whereas Part 383 only applies to drivers of CMVs over 26,000 pounds GVWR. Part 392 mandates the instruction of these rules for all officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of CMVs. This Part reflects and redirects to Part 382 for the prohibition of alcohol, drugs, and other substances.

Q. Who is subject to the DOT drug and alcohol testing regulations?

A. Under 49 C.F.R. § 40.1, transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors, and volunteers as covered by DOT agency regulations), and service agents are subject to the DOT drug and alcohol testing regulations. This includes anyone holding a CDL, including all interstate and intrastate truck and motorcoach operations, such as commercial truck or bus operators, self-employed drivers, federal, state, tribal and local governments, church and civic organizations, for-hire motor carriers, and school bus drivers.

Q. What are the different kinds of tests, when are they required, and what rule should I check?

A. Pre-employment controlled substance tests are addressed under 49 C.F.R. § 382.301. post-accident alcohol or controlled substance tests are addressed under 49 C.F.R. § 382.303. Random alcohol or controlled substances tests are addressed under 49 C.F.R. § 382.305. Reasonable suspicion alcohol or controlled substance tests are addressed under 49 C.F.R. § 382.307. Return-to-duty alcohol or controlled substances tests are addressed under 49 C.F.R. § 382.309. Follow-up alcohol or controlled substance tests are addressed under 49 C.F.R. § 382.311.

Q. How is testing conducted?

A. “Alcohol testing is done using evidential breath testing (EBT) and non-evidential breath testing devices approved by the National Highway Transportation Safety Administration 5 (NHTSA). Anyone who conducts alcohol testing must be trained to operate the EBT and proficient in breath testing procedures. Individuals who successfully complete training are referred to as breath alcohol technicians (BAT). BAT training is available through DOT. Drug testing is done solely by urinalysis for DOT testing and federal workplace drug testing. Hair follicle testing has been increasingly popular with non-DOT employers. All urine specimens are analyzed for the following controlled substances: Marijuana (THC metabolite), Cocaine Amphetamines, Opiates (including heroin), and Phencyclidine (PCP). All controlled substance test results are reviewed and interpreted by a medical review officer (MRO) before they are reported to the employer.”

Q. Who can we test?

A. Under 49 C.F.R. § 40.1, you may test anyone working in a Safety-Sensitive Position. This includes aviation, trucking, railroads, mass transit, pipelines, and other transportation industries.

Q. Are there any exceptions to who we can test?

A. Yes. Under 49 C.F.R. § 382.103(d), the federal regulations do not apply to military personnel, farmers, firefighters, or CMV operators executing emergency governmental functions (not subject to normal traffic regulation).

Q. How do I know when an employee is performing Safety-Sensitive work?

A. Under 49 C.F.R. § 382.107, safety-sensitive functions occur only when drivers begin work or are required to be ready to work—until they are relieved from all responsibility for performing work. Safety-sensitive functions are: 1. All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the employee has been relieved from duty by the employer; 2. All time inspecting equipment as required by 49 C.F.R. §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time; 3. All time spent at the driving controls of a commercial motor vehicle in operation; 4. All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of 49 C.F.R. § 393.76 of this subchapter); 5. All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and 6. All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Q. What is the limit for blood alcohol concentration?

A. Under 49 C.F.R. § 382.201, drivers are prohibited from performing safety-sensitive functions while having an alcohol concentration of 0.04 or greater, and employers are prohibited from permitting drivers to do so.

Q. Can we fire an employee for off-duty conduct?

A. Federal rules do not address whether an employer must fire an employee for any off-duty or on-duty conduct. However, under labor law principles and case law, an employer may terminate an employee for off-duty or on-duty conduct.

1. For an employer to fire an employee for off-duty conduct, the employer must provide a written policy that reasonably puts employees on notice that a CDL is a condition of employment or that an off-duty DUI charge, conviction, or related CDL

suspension will lead to termination. This is important because courts will enforce an arbitration award reinstating an employee terminated for violating a drug and alcohol policy when the award draws its essence from the collective bargaining agreement and does not contravene an explicit and well-defined clear public policy. *Eastern Assoc. Coal Corp.*, 531 U.S. at 62 (arbitration award ordering reinstatement of truck driver, terminated for testing positive twice for marijuana in violation of DOT regulations, should be enforced on the grounds that termination violated the just cause provision in the collective bargaining agreement and the arbitration award was not contrary to public policy) (citing *W.R. Grace and Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)).

2. For an employer to fire an employee for off-duty conduct, the employer must assert a specific basis—at the time of termination—for terminating an employee based on a policy violation. *See Dept. of Homeland Sec.*, 132 LA 745 (Hoose, 2013) (just cause lacking where the employer could not identify a specific policy violation or show nexus between employee's actions and the CBA or a company policy).

3. Overall, the Federal regulations only outline that an employer must remove an employee from performing safety-sensitive functions. The regulations also outline a driver's CDL-related consequences upon violating the rules. However, the rules do not address DUI citations and convictions unrelated to operating a commercial vehicle while on work time.

4. Under Montana law, an employer must have good cause for terminating an employee not covered by a CBA. Under Mont. Code Ann. § 39-2-903(5), *good cause* means “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason unless the employer acts within the provisions of 39-2-313(3) or (4).” Therefore, an employer may—but is not required to—terminate an employee for on-duty conduct, so long as the termination satisfies the statutory definition of “good cause.”

Q. What about pre-duty use?

A. Under 49 C.F.R. § 382.207, drivers are prohibited from using alcohol within four hours of performing safety-sensitive functions, and employers—with actual knowledge—are prohibited from permitting drivers to do so.

Q. What happens after an employee gets in an accident?

A. Under 49 C.F.R. § 382.303, a driver is required to take a post-accident alcohol or controlled substance test if at the time of the accident: (1) they were performing safety-sensitive functions; (2) someone lost their life; (3) they received a citation within 8 hours (alcohol test) or 32 hours (controlled substance test) of the accident, (4) A person was physically injured and needed immediate medical treatment away

from the scene of the accident, or (5) another motor vehicle incurred disabling damage from the accident.

Under 49 C.F.R. § 382.209, if a driver is required to take a post-accident alcohol test under § 382.303, that driver cannot use alcohol for 8 hours following the accident or until undergoing a post-accident alcohol test.

Q. What happens if my employee refuses to take a test?

A. Federal law does not mandate employee discipline. Under 49 C.F.R. § 382.507, the employer must prohibit the employee from performing safety-sensitive functions, and the employee may be subject to civil and criminal penalties.

Under labor law, refusal to take a drug or alcohol test may only constitute grounds for termination where the employer has a clear and lawful testing policy in place. *See Discipline and Discharge in Arbitration, supra*, ch. 6.II.C.; *Mansfield Foundry Corp.*, 109 LA 593 (Chattman, 1997) (employee reinstated where the employer had no testing policy); *Tocco, Inc.*, 323 NLRB 480, 155 LRRM 1138 (1997) (employees discharged under unlawful drug testing policy reinstated with back pay); *Lithibar Matik, Inc.*, 109 LA 446 (Hodgson, 1997) (employee reinstated who refused to take drug test because policy unlawful where employer refused to bargain about it on union's request).

Under Montana law, an employer may discharge an employee not covered by a CBA for failure to pass, or refusal to take, a drug test in violation of an employer's written workplace drug policy, if the testing procedures comply with federal drug testing statutes and administrative regulations applicable to private sector employers and employees as provided in Title 39, chapter 2. Under Montana Code Ann. § 39-51-2303, an employee is disqualified from receiving worker's compensation post-discharge (this subsection does not apply to a drug testing for marijuana or marijuana products administered to an individual who is a registered cardholder under House Bill No. 701 §§ 9-23).

Q. Who pays for employee testing?

A. The employer. The employer must also pay the employee at their regular rate while the employee is being tested. 49 C.F.R. § 40.289.

Q. What happens if an employee tests positive for alcohol consumption?

A. Under 49 C.F.R. § 382.505, if an employee tests between 0.02 and 0.04, that employee may not perform safety-sensitive functions until the start of their next scheduled work period occurring 24-hours post-test.

Q. What happens if an employee tests positive for marijuana?

A. If your employee is subject to DOT regulations, you must follow the DOT rules and regulations because any state law authorizing medical marijuana usage does not cancel out DOT regulations.

Any Department of Justice guidelines permitting the use of medical marijuana per state law have no impact on the Department of Transportation. Marijuana remains a Schedule I Controlled Substance, and safety-sensitive employees may **not** use marijuana.

Under Montana law, an employer may not punish an employee for using a lawful product—even marijuana—off-duty and off-premises. Mont. Code Ann. § 39-2-313.

Under Montana law, an employer may not refuse to employ or license, and may not discriminate against, an employee for using a lawful product—even marijuana—off-duty and off-premises. *Id.*

However, Montana’s Medical Marijuana Act permits an employer to terminate an employee for violating a marijuana use policy. Mont. Code Ann. § 16-12-108; *See also Johnson v. Columbia Falls Aluminum Company LLC*, 350 Mont. 562 (2009).

Q. I think one of my employees might be drinking on the job. What kind of evidence do I need to have before testing that employee?

A. Under 49 C.F.R. § 382.205, an employer must have actual knowledge of the employee being under the influence of drugs or alcohol. Under 49 C.F.R. § 382.107, actual knowledge is gained through: i. an employer’s direct observations; ii. Information from a previous employer(s); iii. traffic citations: a ticket, complaint, or charging document related to driving a CMV while under the influence of alcohol or controlled substances.

Q. I think my employee is dealing drugs on premises, what happens next?

A. Under labor law, arbitrators typically require a clear and convincing standard of proof—not merely hearsay evidence—when employees are disciplined for allegedly selling or distributing drugs. *Discipline and Discharge in Arbitration, supra*, ch. 6.II.B.3.

Under federal law, a driver convicted of a felony, such as drug dealing, is not disqualified from operating a CMV under Title 49. Further, if the offense involved a non-CMV, or was unrelated to motor vehicles, there is no prohibition to employment of the person as a driver. However, if an employee uses a CMV in selling or distributing drugs, that employee may lose their CDL for life. Overall, Title 49 only regulates whether a driver is qualified to hold a CDL, not whether the employer must

terminate the employee. 49 C.F.R. 383.51, Disqualification of Drivers.

Under Montana law, an employer may—but is not required to—terminate an employee not covered by a CBA for drug dealing so long as the termination satisfies the statutory definition of *good cause*.

Q. Am I obligated to rehabilitate my employee?

A. No. However, if you choose to rehabilitate an employee, you must follow 49 C.F.R. § 40 in developing and implementing your program.

Q. If I rehabilitate an employee, what is the return-to-work process?

A. Under 49 C.F.R. § 40.305, only the employer may decide whether the employee returns to performing safety-sensitive duties. Under 49 C.F.R. § 40, to satisfy the return-to-work requirements, the employee must be evaluated by a Substance Abuse Professional (“SAP”) and comply with their recommendations. Under 49 C.F.R. § 40.305, if an employer allows an employee to perform safety-sensitive functions again, the employee must take a return-to-duty test after the SAP determines that the employee complied with the education or treatment. Further, the employee must have an alcohol concentration of less than 0.02.

F. Montana Marijuana Law

1. Employer Regulation of Employee Marijuana Use.

HB 701, adopted by the 2021 Montana Legislature, made major changes in Montana’s marijuana laws. However, the bill did not significantly affect the regulation of an employee’s use of marijuana. *See* Appendix D for the changes established by HB 701.

2. Employers May Terminate Employees for Medical Marijuana Use Resulting in a Positive Drug Test.

Long before HB 701—yet consistent with the revised statutes under HB 701—the Montana Supreme Court held that medical marijuana users may be terminated in accordance with a company’s policies based on a positive drug test. *Johnson v. Columbia Falls Aluminum Co., LLC*, 350 Mont. 562 (2009). The Court reasoned that:

- a. An employer does not have to accommodate an employee’s medical marijuana use and does not violate the MHRA or the ADA upon non-accommodation. *Id.*
- b. The Montana Medical Marijuana Act provides that an employer is not required to accommodate an employee’s use of medical marijuana. *Id.*
- c. If an employer is not a state actor, their actions do not provide a cause of action for violation of an employee’s constitutional right to privacy when terminating an employee for a positive marijuana test. *Id.*

G. Drug and Alcohol Testing Case Law

1. Alcohol Testing

a. PA: Public Policy Did Not Bar Termination upon a Positive Alcohol Test.

In PA, public policy did not bar termination of a nuclear power plant employee who tested positive for alcohol, holding that there is no private right of action for violations of the Nuclear Regulatory Commission regulations relating to drug testing. Mary-Ann Czak, *Pennsylvania Public Policy Did Not Bar Termination of Nuclear Power Plant Employee Who Tested Positive for Alcohol Concentration* (October 24, 2019) (citing *Bennett v. Talen Energy Corp.*, No. 3:19cv521 (M.D. Pa. 2019)).

b. PA: Warrantless Breathalyzer Testing of School Employees Is Constitutional.

In PA, a school employee's detainment and breathalyzer test did not violate her First, Fourth, and Fourteenth Amendment rights under the "special needs" exception to the Fourth Amendment warrant and probable cause requirements when the smell of alcohol on her breath created reasonable suspicion and she held a position warranting (1) a lowered right of privacy and (2) heightened regulations. *Donegan v. Livingston*, 877 F.Supp.2d 212, 221 (M.D. Pa. 2012).

2. Arbitration Cases

a. 2020: No Just Cause to Fire Employee for Positive Drug Test.

"The Eleventh Circuit Court of Appeals has reinstated an arbitrator's award that an employer did not have just cause to fire an employee who had tested positive for codeine. Although the arbitrator understood the portion of the CBA concerning discharge for positive results differently than the district court did, the circuit court stated that it was clear he grappled with the text of the contract and did not ignore or modify that language." Ronald Miller, *Arbitration Award Finding No Just Cause to Fire Employee Who Had Positive Drug Test Reinstated by 11th Circuit* (December 7, 2020) (citing *Georgia-Pacific Consumer Operations, LLC v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, Local 9-0952*, No. 20-10646 (11th Cir. 2020)).

"After accidentally taking his wife's cough syrup with codeine, an employee failed a random drug test. He was subsequently terminated under the employer's zero-tolerance policy regarding positive drug tests. The arbitrator determined that under the parties' collective bargaining agreement, the employer lacked just cause to terminate his employment and ordered the employer to reinstate the employee and make him whole for all of the time he missed save for a 90-day suspension." *Id.*

b. 2020: Grievance Denied; Strong Odor Constitutes Reasonable Suspicion.

"A strong odor of marijuana was sufficient to constitute reasonable suspicion to test, and a positive drug test result constituted just cause for a ten-day suspension, an arbitrator ruled in denying an employee's grievance." Mary-Ann Czak, *Suspension*

of Employee Based on Marijuana Odor and Positive Test Result Did Not Violate CBA (October 7, 2020) (citing *ZF Active and Passive Safety*, 2020 LA 1242 (Fullmer, 2020)).

“In challenging the suspension, the union argued that a combination of smelling marijuana and the positive test result were insufficient to justify the suspension because the CBA — in using the term ‘usage’ — required evidence of impairment. The arbitrator disagreed and determined ‘usage’ was proven by the positive test results, i.e., a positive drug test can be equated with being under the influence regardless of the status of observational evidence” *Id.*

c. 2020: Grievance Denied; Personal Use and State Legalization.

“A Missouri-based manufacturer of animal pharmaceuticals had just cause to terminate a 37-year employee who tested positive for marijuana despite the union’s argument that the employee’s personal use of CBD oil and marijuana did not cause impairment at work. The drug test was subject to confirmatory testing, and a Medical Review Officer attempted to reach the employee before certifying the results. Due to the employee’s failure to respond, the Medical Review Officer reported the test result as positive. The employer then suspended the employee pending investigation, giving the employee an opportunity to provide documentation to explain the test result. The employee failed to do so, and the employer terminated the employee.” Catherine Cano, *Missouri Employer Had Just Cause to Terminate Union Employee Who Tested Positive for Marijuana, Despite Lack of Workplace Impairment* (March 1, 2021) (citing *Virbac Corporation and International Brotherhood of Electrical Workers, Local 1* (Horn, 2020)).

“The arbitrator determined that the employer met its burden of showing just cause, reasoning that the legalization of marijuana ‘whether medicinal or recreational,’ does not require employers to embrace the use of ‘legal’ marijuana products. The arbitrator further found that the Department of Human Health and Services’ testing thresholds are ‘effective, lawful and enforceable,’ and do not require ‘impairment.’ The arbitrator recognized the employee’s significant tenure with the company, but ultimately found the employee’s dishonesty regarding his marijuana use was an aggravating circumstance and that his behavior was particularly egregious given his role on the safety committee.” *Id.*

3. Disability Discrimination

a. PA: Medical Marijuana Users Need Only Show Good Faith Accommodation Request.

“A federal court in Pennsylvania held that a medical marijuana user’s claims for disability discrimination and retaliation were sufficiently alleged to survive the employer’s motion to dismiss. The employer terminated the employee’s employment after she tested positive for marijuana on a return-to-duty drug test. The employee’s medical marijuana card was expired at the time she tested positive. However, she subsequently renewed it and provided a doctor’s note stating her positive test was

consistent with her prescription (pre-expiration).” Catherine Cano, *Pennsylvania Medical Marijuana User May Proceed with Disability Discrimination and Retaliation Claims* (January 18, 2021) (citing *Hudnell v. Jefferson University Hospitals, Inc.*, 2021 WL 63252 (E.D. Pa. 2021)).

“The court also found that she had requested several accommodations other than marijuana use and that the employer failed to engage in the interactive process. . . The court further reasoned that it did not matter whether the employee’s medical marijuana usage fell outside of the PHRA’s definition of disability or handicap, because the employee only needed to show that she requested an accommodation in good faith. Her retaliation claim was not contingent on showing an actual disability.” *Id.*

b. TN: Courts Unlikely to Support Medical Marijuana Accommodation.

A federal district court in Tennessee has held that a bipolar municipal employee who used cannabidiol (CBD) to treat her anxiety, chronic fatigue syndrome, and other symptoms, and who was forced to resign after failing a marijuana drug test required for promotion to a full-time position, failed to show that the city’s HR Director knew about her disability. The court reached this conclusion even though the employee talked to her supervisor about her use of CBD to treat her various symptoms, telling her she had researched CBD usage and the risks of a positive drug screen, and there was evidence her supervisor’s boss knew of her bipolar disorder and anxiety. *Hamric v. City of Murfreesboro*, 2019 WL 11027734 (M.D. Tenn. 2020).

c. MA: Handicap Discrimination Suits Permissible Re Medical Marijuana.

The Massachusetts Supreme Court has ruled that a woman (Barbuto) who had been fired for testing positive for marijuana that she had been legally prescribed under state law may sue her former employer for handicap discrimination. The court rejected the employer’s argument that she could not sue because possessing marijuana remains illegal under federal law. Barbuto accused Advantage Sales and Marketing of firing her after her first day of work because she tested positive for marijuana, which had been prescribed by a doctor to treat low appetite, a side effect of her Crohn’s disease. The court stated that if a doctor concludes that medical marijuana is the most effective treatment for an employee’s debilitating condition, “an exception to an employer’s drug policy to permit its use is a facially reasonable accommodation. . . The fact that the employee’s possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation.” Massachusetts voters approved the medicinal use of marijuana in 2012, joining the majority of states that allow for the drug’s medical use. *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37 (Mass. 2017).

4. Due Process

a. Ninth Circuit, 2015

In an unpublished decision, the Ninth Circuit Court of Appeals reversed a district court decision denying qualified immunity to hospital administrators who terminated

a nurse following a positive drug test. The nurse alleged that his termination violated his procedural due process rights under the Fifth and Fourteenth Amendments. Before the termination, the defendants provided the plaintiff with notice that the presence of drugs in his sample could result in termination under hospital policy. He was given an opportunity to explain the drug test result at a lengthy meeting with three hospital administrators and the medical review officer who interpreted the drug test results. The nurse also had the opportunity to submit additional documentation explaining the presence of drugs in his sample before his eventual termination. In reversing the denial of qualified immunity the court stated that: “[P]rocedural due process requirements can rarely be considered clearly established[,] at least in the absence of closely corresponding factual and legal precedent.” . . . Here, no clearly established law put Defendants on notice that Plaintiff was entitled to more process than he received.” The court further noted that the medical review officer’s decision to change the designation of the drug screen report from negative to positive three weeks after the plaintiff’s meeting with hospital administrators did not demonstrate a lack of due process. Likewise, the fact that the defendants never gave the plaintiff the numerical values of his test results was not dispositive because the defendants reasonably could have believed that the process, they provided was legally sufficient. *King v. Garfield County Public Hospital District No. 1*, 641 Fed.Appx. 696 (9th Cir. 2015).

b. Ninth Circuit, 2014

The Ninth Circuit Court of Appeals has affirmed a Public Law Board arbitration decision affirming the employment termination of a railroad employee. The circuit court determined that there was no violation of the employee’s due process rights in a preliminary on-property investigative hearing because the railroad was a private actor. The court also held that the Public Law Board did not violate the employee’s due process rights.” *Robert Bradford, Jr. v. Union Pacific Railroad Company*, 767 F.3d 865 (9th Cir. 2014).

“The employee was discharged for failing a mandatory drug test, but was allowed to return to work following treatment, subject to a policy requiring his dismissal should he violate the policy within ten years. The employee was subsequently discharged after he tested positive for prohibited substances. He contested the discharge because a second specimen, collected on the same day as the first specimen, was negative for drugs and alcohol. The employee also had a sample of his hair tested for amphetamines, which resulted in a negative finding. Following his discharge, the matter then went before the Public Law Board for binding arbitration. . . The Board found that the employer had shown that the employee violated the conditions of his return to employment.” *Id.*

On appeal from a district court decision affirming the Board’s decision, the Ninth Circuit concluded that: “[A] litigant receives adequate due process where, in the context of the circumstances at issue, sufficient procedures provide the individual an opportunity to be heard before he is deprived of life, liberty, or property. . . Bradford asserts that the Board considered an incomplete record because the Hearing Officer

excluded evidence relevant to the dispute, including his negative hair sample test and the testimony of an expert witness. However, the Board received all the evidence submitted in the petition for review, including the evidence that the Hearing Officer had admitted and excluded.” *Id.*

5. Invasion of Privacy

a. AL: Employer Counting Employee Medication Constitutes Privacy Invasion.

“A federal court in Alabama held that an employer’s request to count an employee’s prescription medication – in connection with a drug test that the employee passed – supported the employee’s claim for invasion of privacy. The plaintiff was a former employee employed as a bus driver for the Birmingham-Jefferson County Transit Authority.” Kathryn Russo, *Employer’s Request to Count Employee’s Prescription Medication Sufficient to Support Invasion of Privacy Claim* (February 10, 2020) (citing *Effinger v. Birmingham-Jefferson County Transit Authority*, 2020 WL 374667 (N.D. Al. 2020)).

6. Negligent Testing Procedures

a. SC: Drug Testing Facilities Owe a Duty of Care to Tested Individuals.

“The South Carolina Supreme Court held that laboratories who perform workplace drug tests on behalf of employers owe a duty of care to the individuals who are tested and may be sued for negligence for failing to perform the drug tests and report the results properly and accurately.” Kathryn Russo, *Drug Testing Laboratories May Be Sued for Negligence in South Carolina* (March 22, 2019) (citing *Shaw v. Psychomedics Corp.*, 826 S.E.2d 281 (S.C. 2019)).

“Specifically, the Court concluded that there were several bases to support a finding that a laboratory may be sued for negligence by an employee who was drug tested, including: (1) the laboratory’s contractual relationship with the employer; (2) the fact that the employee would suffer a direct economic injury, such as loss of employment, if the laboratory was negligent in testing the specimen; and, (3) public policy considerations, i.e., there is a significant public interest in ensuring accurate drug tests because countless employees are required to undergo drug testing as a condition of their employment.” *Id.*

“The Court noted that the consequences of an erroneous drug test result can be devastating to an employee who may be terminated and unable to find other employment. The laboratory, on the other hand, would effectively be immunized from liability if the Court held that there is no duty of care to the tested employee. Additionally, the Court stated that the recognition of a duty of care advances a major policy goal of tort law: deterrence. A drug testing laboratory is more likely to ensure accuracy in its testing process if it owes a duty of care to the tested individuals. Finally, the Court was persuaded by the fact that courts in New York, Pennsylvania and Wyoming have all determined that a drug testing facility owes a duty of care to the person subject to testing.” *Id.*

b. KY: Employers May be Liable for Testing Inaccuracies.

Employers may face liability for inaccurate drug testing procedures and/or inaccurately reporting results of a drug test. The Kentucky Court of Appeals has held that an employee who was fired following a drug test may sue the employer for defamation over its alleged failure to accurately report the test results to potential future employers. *Shrout v. The TFE Group*, 161 S.W.3d 351 (Ky. Ct. App. 2005).

7. Pre-Employment Testing

a. Eleventh Circuit: Testing Permissible for Substitute Teacher Applicants.

The Eleventh Circuit Court of Appeals has held that a school board may require all applicants for substitute teaching positions to pass a drug test. Despite a presumption of unconstitutionality, the court held that “suspicionless searches are permissible in cases where they serve powerful and unique public needs. Finding that teachers have diminished privacy interests in the school setting; that a urine test is minimally invasive; and that the government has a compelling interest to protect students by ensuring teachers are not impaired; the court held that the plaintiff had not shown a substantial likelihood of success on her Fourth Amendment claim and affirmed the denial of a preliminary injunction.” Lorene Park, *Suspicionless Drug Testing of Prospective Teachers Didn’t Violate 4th Amendment* (December 28, 2018) (citing *Friedenberg v. School Board of Palm Beach County*, 911 F.3d 1084 (11th Cir. 2018)).

b. Ninth Circuit: Testing Unconstitutional for School Job Applicants.

However, a three-member panel of the Ninth Circuit Court of Appeals has held that a city policy requiring job applicants to pass a pre-employment drug test as a condition of employment is unconstitutional as applied to the position of part-time library page. The panel rejected the policy because the city failed to show that the position was ‘safety-sensitive’ or that there was a ‘special need’ to screen a prospective page for drugs. Unlike Sixth Circuit’s decision in *Knox County*, where the court upheld suspicionless drug testing of teachers and administrators, because of the unique role that they play in the lives of school children and the *in loco parentis* obligations imposed upon them, the Ninth Circuit panel concluded ‘that a part-time page, who could be a high school student herself, has no such role’ in the city library. *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008).

c. MT: Pre-Employment Testing Constitutional.

Under Montana’s Workforce Drug and Alcohol Testing Act, an employer may require a job applicant to undergo a pre-employment drug test as a condition of an offer of employment. In addition, mandatory drug testing of applicants for public employment has been determined to be permissible under the Fourth Amendment. In *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), *cert. denied* 502 U.S. 1020 (1991), the circuit court noted that there is a constitutional distinction between testing a current employee and an applicant for a position. When balancing the prospective employee’s privacy interest against the government’s special needs, the Court held, an applicant for a job has a lesser expectation of privacy than does a

person already employed and commented that there is a distinct difference between losing what one has and not getting what one wants. The Court further concluded that job applicants have a lesser expectation of privacy due to the pervasive public knowledge that the majority of the large private employers require all job applicants to submit to pre-employment drug testing. The court stated that ‘what is occurring generally outside government is some indication of what expectations of privacy society is prepared to accept as reasonable when the government engages in the hiring process.’” *Willner*, 928 F.2d at 1192, citing *Katz v. United States*, 389 U.S. 347, 361 (1967).

8. Post-Accident Testing

a. OK: Positive Post-Accident Test Does Not Prove Causation.

“An Oklahoma state court held that a positive post-accident drug test for marijuana did not prove that marijuana use caused the accident, and therefore the claimant was eligible for workers’ compensation benefits.” The court upheld the ALJ’s ruling, agreeing that “the employer should provide medical treatment and temporary benefits.” Kathryn Russo, *Oklahoma Court Holds that Positive Marijuana Drug Test Did Not Prove That Marijuana Caused Accident* (October 24, 2019) (citing *Rose v. Berry Plastics Corp.*, 451 P.3d 195 (Ok. Civ. Ct. App. 2019)).

9. Reasonable Suspicion Testing

a. RI: Low Bar for Reasonable Suspicion Testing.

“The Rhode Island Supreme Court affirmed the dismissal of a lawsuit against an employer who terminated an employee for refusing to submit to a reasonable suspicion drug test, even though the employee’s odd behaviors could have been attributable to pain [from a workplace injury]. The plaintiff [] claimed that his former employer required him to take a drug test, allegedly without ‘reasonable grounds’ as required by the Rhode Island drug testing law. That law permits testing when the employer has reasonable grounds to believe, based on specific aspects of the employee’s job performance and specific contemporaneous documented observations, concerning the employee’s appearance, behavior or speech that the employee may be under the influence of a controlled substance, which may be impairing his or her ability to perform his or her job. . . . The [] Court did not agree with [plaintiff’s] argument that because his behavior ‘could’ have been pain-related, there was no basis for drug testing. Even if his odd behavior had been due to pain, rather than drugs, the employer still had reasonable grounds to believe that [he] may have been under the influence of drugs. The drug testing statute does not require an employer to be certain that an employee is under the influence of drugs or alcohol.” *Id.* Kathryn Russo, *Rhode Island Supreme Court Upholds “Reasonable Grounds” Drug Testing Even Where There Is Another Possible Explanation for Employee’s Behaviors* (June 1, 2020) (citing *Colpitts v. W.B. Mason Co., Inc.*, 227 A.3d 996 (R.I. 2020)).

10. Weingarten Rights

a. Members Entitled to Consult with Union Representative Before Testing.

The National Labor Relations Board has held that unionized employees have a right to consult with a union representative before being required to submit to a drug or alcohol test. Under the U.S. Supreme Court's *Weingarten* decision, these employees have a right to request union representation in connection with an investigatory interview that could lead to discipline. Based on this doctrine, the NLRB overturned an employee's suspension and discharge, finding that his discipline was linked to his request for representation after being referred for a drug test. The employee refused to submit to the test after his representation request was denied. He was subsequently discharged for insubordination. The Board determined that the discharge was improper because the employee could not be required to waive his Weingarten rights. The Board also noted that unionized employers that refer union-represented employees for a drug or alcohol test do not need to advise employees of their Weingarten rights. Where a unionized employer refers an employee for a test, and a union-represented employee refuses to submit to testing but does not request representation, adverse employment action is lawful. Absent language in the labor agreement, the employer does not need to grant an employee's request to consult with a specific union representative or to unreasonably delay a drug or alcohol test if no union representative is available. *Ralph's Grocery Co.*, 361 NLRB No. 9 (2014).

11. Employee Discharge Analysis

DUI convictions unrelated to operating a commercial vehicle while on work time are not covered by DOT regulations. Therefore, Employers must provide written policy that reasonably puts employees on notice that a CDL is a condition of employment or that an off-duty DUI charge, conviction or related CDL suspension will lead to termination. Employers should use caution when implementing zero-tolerance policies based on federal law or regulations, such as 41 U.S.C. § 8102 (Drug-free Workplace Requirements for Federal Contractors). Although the Act constitutes clear public policy prohibiting the possession or use of drugs and alcohol in the workplace, it does not apply to off-duty conduct or all classes of employees.

DOT regulations are directed at preventing the misuse of drugs and alcohol related to work activities and the operation of commercial motor vehicles. DOT regulations do not apply to off-duty conduct or the use of a personal vehicle. *Vaughan v. Hair*, 645 So.2d 1177, 1183 (La. App. 3d Cir. 1994); 49 C.F.R. § 382.101 ("to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles"); 49 C.F.R. § 382.103 (applies to "every person and to all employers of such persons who operate a commercial motor vehicle"). DOT regulations do not establish public policy relevant to regulating the misuse of alcohol unrelated to work or operating commercial motor vehicles.

DOT regulations do not disqualify a person from holding a CDL or working in a

DOT safety-sensitive position due to a DUI conviction while operating a personal motor vehicle. 49 C.F.R. § 383.51; *see* www.fmcsa.dot.gov/regulations/title49/section/383.51 (FMCSA's answer to Question 12 states, "the convictions triggering mandatory disqualification under § 383.51 all pertain to offenses that occur while the person is driving a Commercial Motor Vehicle"). Further, DOT regulations do not require termination of an employee convicted of an off-duty DUI or prohibit an employee convicted of an off-duty DUI from working in a position that does not require a CDL. *See* 49 C.F.R. §§ 382.201, 382.207; *see also McIntyre v. Seminole County School Bd.*, 779 So. 2d 639, 644, n. 3 (Fla. App. 2001) ("[M]andatory termination of the employee is not required and the regulation contemplates that a driver will return to work under controlled conditions.") (citing 49 C.F.R. § 382.605).

DOT regulations do not even require employee termination in all cases of drug and alcohol violations that occur on duty. 49 C.F.R. §§ 382.605, 382.217; *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 999 (D. Or. 1994) ("In actuality the regulations merely provide that any driver who is found to be in violation of the provisions of section (a) or (b) shall be placed out-of-service immediately for a period of 24 hours. 49 § C.F.R. 392.5(c). The regulations say nothing about terminating the driver."); *see also Eastern Assoc. Coal v. United Mine Workers*, 531 U.S. 57, 64–66 (2000). The regulations focus on remediation and treatment as the first course of action, with suspension from duties and then the reinstatement of employees to DOT safety-sensitive positions after CDL reinstatement. 49 C.F.R. § 382.605.

While CDL holders are subject to license suspension for a period due to a DUI conviction, they will be eligible for reinstatement. 49 C.F.R. §§ 382.501–382.505. Courts will enforce an arbitration award reinstating an employee terminated for violating a drug and alcohol policy when the award draws its essence from the collective bargaining agreement and does not contravene an explicit and well-defined clear public policy. *Eastern Assoc. Coal Corp.*, 531 U.S. at 62 (arbitration award ordering reinstatement of truck driver, terminated for testing positive twice for marijuana in violation of DOT regulations, should be enforced on the grounds that termination violated the just cause provision in the collective bargaining agreement and the arbitration award was not contrary to public policy) (citing *W.R. Grace and Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)). At the time of termination, Employers must assert a specific basis for terminating an Employee based on a policy violation. *See Dept. of Homeland Sec.*, 132 LA 745 (Hoose, 2013) (just cause lacking where employer could not identify a specific policy violation or show nexus between employee's actions and the CBA or a company policy).

APPENDIX A

Employees covered under DOT Testing Regulation 49 C.F.R. Part 40

a. Federal Motor Carrier Safety Administration (FMCSA)

49 C.F.R. Part 382

Covered employee: A person who operates (i.e., drives) a Commercial Motor Vehicle (CMV) with a gross vehicle weight rating (gvwr) of 26,001 or more pounds; or is designed to transport 16 or more occupants (to include the driver); or is of any size and is used in the transport of hazardous materials that require the vehicle to be placarded.

b. Federal Railroad Administration (FRA)

49 C.F.R. Part 219

Regulated employee: A person who performs covered service (subject to hours-of-service laws) functions at a rate sufficient to be placed into the railroad's random testing program. Categories of personnel who normally perform these functions are locomotive engineers, trainmen, conductors, switchmen, locomotive hostlers/helpers, utility employees, signalmen, operators, and train dispatchers.

In addition, a person who performs a maintenance-of-way/roadway worker function (as defined in 49 C.F.R. Part 214) who are employees or contractors of a railroad, have a potential to foul the track, and perform a regulated function such as inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track, as well, flagman and watchmen/lookouts.

c. Federal Aviation Administration (FAA)

14 C.F.R. Part 120

Covered employee: A person who performs flight crewmember duties, flight attendant duties, flight instruction duties, aircraft dispatch duties, aircraft maintenance or preventive maintenance duties; ground security coordinator duties; aviation screening duties; air traffic control duties, and operations control specialist duties. Note: Anyone who performs the above duties directly or by contract for a part 119 certificate holder authorized to operate under parts 121 and/or 135, air tour operators defined in 14 C.F.R. part 91.147, and air traffic control facilities not operated by the Government are considered covered employees.

d. Federal Transit Administration (FTA)

49 C.F.R. Part 655

Covered employee: A person who performs a revenue vehicle operation; revenue vehicle and equipment maintenance; revenue vehicle control or dispatch (optional); Commercial Drivers License non-revenue vehicle operation; or armed security duties.

e. Pipeline and Hazardous Materials Safety Administration (PHMSA)

49 C.F.R. Part 199

Covered employee: A person who performs on a pipeline or liquefied natural gas (LNG) facility an operation, maintenance, or emergency-response function.

f. United States Coast Guard (USCG)

46 C.F.R. Parts 4 and 16

Covered employee: A person who is on board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document. Also, a person engaged or employed on board a U.S. owned vessel and such vessel is required to engage, employ, or be operated by a person holding a license, certificate of registry, or merchant mariner's document.

APPENDIX B

Mont. Code Ann. §§ 39–2–205 through 39–2–211 may be cited as the “Workforce Drug and Alcohol Testing Act”. The Act provides as follows:

39–2–206. Definitions. As used in 39–2–205 through 39–2–211, the following definitions apply:

(1) “Alcohol” means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) “Alcohol concentration” means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(3) “Controlled substance” means a dangerous drug, as defined in 49 C.F.R., part 40, except a drug used pursuant to a valid prescription or as authorized by law.

(4) (a) “Employee” means an individual engaged in the performance, supervision, or management of work in a:

- (i) hazardous work environment;
- (ii) security position; or
- (iii) position:
 - (A) affecting public safety or public health;
 - (B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or
 - (C) involving a fiduciary responsibility for an employer.

(b) The term does not include an independent contractor or an elected official who serves on the governing body of a local government.

(5) (a) “Employer” means a person or entity that has one or more employees and that is located in or doing business in Montana.

- (b) The term includes the governing body of a local government.
- (6) “Governing body” means the legislative authority of a local government.
- (7) “Hazardous work environment” includes but is not limited to positions:
 - (a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;
 - (b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or
 - (c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.
- (8) “Local government” means a city, town, county, or consolidated city-county.
- (9) “Medical review officer” means a licensed physician trained in the field of substance abuse.
- (10) “Prospective employee” means an individual who has made a written or oral application to an employer to become an employee.
- (11) “Qualified testing program” means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39–2–207 and 39–2–208.
- (12) “Sample” means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol.

39–2–207. Qualified testing program. A qualified testing program must comply with the following criteria:

- (1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that are covered by 49 C.F.R., part 40, must conform to 49 C.F.R., part 40. For samples that are not covered by 49 C.F.R., part 40, the qualified testing program must contain chain-of-custody and other procedural requirements that are at least as stringent as those contained in 49 C.F.R., part 40, and the testing methodology must be cleared by the United States food and drug administration. At a minimum, the policies and procedures must require:

- (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;
- (b) the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol;
- (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;
- (d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;
- (e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;
- (f) identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in 39–2–208;
- (g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;
- (h) a description of the employer's hiring policy with respect to prospective employees who test positive;
- (i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;
- (j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:
 - (i) the tested employee;
 - (ii) the designated representative of the employer; or
 - (iii) in connection with any legal or administrative claim arising out of the employer's implementation of 39–2–205 through 39–2–211 or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic follow-up testing as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection, transport, and confirmation testing of urine samples must be performed in accordance with 49 C.F.R., part 40, and the collection, transport, and confirmation testing of nonurine samples must be as stringent as the requirements of 49 C.F.R., part 40, in requiring split specimens as defined by the United States department of health and human services, requiring transport to a testing facility under the chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology.

(5) Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.

(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be conducted using testing equipment that appears on the list of conforming products published in the Federal Register.

(7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person to be considered as having alcohol in the person's body.

39–2–208. Qualified testing program – allowable types – procedures. Each of the following activities is permissible in the implementation of a qualified testing program:

(1) An employer may test any prospective employee as a condition of hire.

(2) An employer may use random testing if the employer's controlled substance and alcohol policy includes one or both of the following procedures:

(a) An employer or an employer's representative may establish a date when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.

(b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:

(i) an established calendar period for testing;

(ii) an established testing rate within the calendar period;

(iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;

(iv) all supervisory and managerial employees in the random selection and testing process; and

(v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.

(3) An employer may require an employee to submit to follow-up tests if the employee has had a verified positive test for a controlled substance or for alcohol. The follow-up tests must be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year from the time that the employer first requires a follow-up test.

(4) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with the supervisory training requirement in 49 C.F.R., part 382. 603, whenever the employer requires a test on the basis of reasonable suspicion.

(5) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of \$1,500.

39-2-209. Employee's right of rebuttal. The employer shall provide an employee who has been tested under any qualified testing program described in 39-2-208 with a copy of the test report. The employer is also required to obtain, at the employee's request, an additional test of the split sample by an independent laboratory selected by the person tested. The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the

additional test results are positive. The employee must be provided the opportunity to rebut or explain the results of any test.

39–2–210. Limitation on adverse action. Except as provided in 16–12–108, no adverse action, including follow-up testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee’s record and destroyed.

39–2–211. Confidentiality of results. (1) Except as provided in subsection (2) and except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

- (a) legal action arising out of an employer’s implementation of 39–2–205 through 39–2–211; or
- (b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.

APPENDIX C: Required Policy Content

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

(b) Required content. The materials to be made available to drivers shall include detailed discussion of at least the following:

- (1) The identity of the person designated by the employer to answer driver questions about the materials;
- (2) The categories of drivers who are subject to the provisions of this part;
- (3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the workday the driver is required to be in compliance with this part;
- (4) Specific information concerning driver conduct that is prohibited by this part;
- (5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under § 382.303(d);
- (6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by

§ 382.303(d);

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under part 40, subpart O, of this title;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and/or referral to management; and

(12) The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:

(i) A verified positive, adulterated, or substituted drug test result;

(ii) An alcohol confirmation test with a concentration of 0.04 or higher;

(iii) A refusal to submit to any test required by subpart C of this part;

(iv) An employer's report of actual knowledge, as defined at § 382.107:

(A) On duty alcohol use pursuant to § 382.205;

(B) Pre-duty alcohol use pursuant to § 382.207;

(C) Alcohol use following an accident pursuant to § 382.209; and

(D) Controlled substance use pursuant to § 382.213;

(v) A substance abuse professional (SAP as defined in § 40.3 of this title) report of the successful completion of the return-to-duty process;

(vi) A negative return-to-duty test; and

(vii) An employer's report of completion of follow-up testing.

(c) Optional provision. The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) Certificate of receipt. Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the signed certificate and may provide a copy of the certificate to the driver.

APPENDIX D: HB 701

Section 43. Section 16–12–108, MCA, is amended to read:

“16–12–108. Limitations of act. (1) This chapter does not permit. . .

~~(2)~~ (4) Nothing in this chapter may be construed to:

(a) require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

(b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

(c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

(d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

(e) permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

Section 65. Section 39-2-210, MCA, is amended to read:

"39-2-210. **Limitation on adverse action.** Except as provided in ~~50-46-320~~ 16-12-108, no adverse action, including follow-up testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed."

Section 66. Section 39-2-313, MCA, is amended to read:

"39-2-313. **Discrimination prohibited for use of lawful product during nonworking hours—exceptions.**

(1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco, and marijuana.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during non-working hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product, ~~including the use of marijuana for a debilitating medical condition as defined in 50-46-302~~, that:

(i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

(ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement. . .”